INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statute and Regulations Involved	2
Statement	2
Argument	3
Conclusion	6
Appendix	7–10

CITATIONS

Cases:	
Corr v. *Hoffman*, 256 N. Y. 254	5
Dougherty v. *Salt*, 227 N. Y. 200	4
French v. *Commissioner*, 138 F. 2d 254	4, 5
Johnson v. *Commissioner*, 86 F. 2d 710	5
Richardson v. *Commissioner*, 126 F. 2d 562	4
Speaker v. *Keating*, 122 F. 2d 706	4
Statute:	
Internal Revenue Code of 1939:	
Sec. 1000 (a) (26 U. S. C. 1952 ed., Sec. 1000 (a))	3, 7
Sec. 1002 (26 U. S. C. 1952 ed., Sec. 1002)	3, 7
Sec. 1003 (a) (26 U. S. C. 1952 ed., Sec. 1003 (a))	7
Sec. 1003 (b) (26 U. S. C. 1952 ed., Sec. 1003 (b))	4, 7–8
Sec. 1004 (a) (26 U. S. C. 1952 ed., Sec. 1004 (a))	8
Sec. 1005 (26 U. S. C. 1952 ed., Sec. 1005)	9
Sec. 1006 (a) (26 U. S. C. 1952 ed., Sec. 1006 (a))	9
Sec. 1006 (b) (26 U. S. C. 1952 ed., Sec. 1006 (b))	9
Sec. 1018 (26 U. S. C. 1952 ed., Sec. 1018)	9
Sec. 3612 (d) (26 U. S. C. 1952 ed., Sec. 3612 (d))	9–10
Miscellaneous:	
Brown on Personal Property (2d ed.), Sec. 59	4
G. C. M. 16460, XV–1 Cum. Bull. 369 (1936)	4
II *Restatement of the Law of Contracts*, Sec. 422, Comment f	5
Treasury Regulations 108, Sec. 86.2 (5)	10

891923—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 171

LESTER E. WOOLSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. 13–15) is reported at 138 F. Supp. 952. The *per curiam* opinion of the Court of Appeals (Pet. 2) is reported at 230 F. 2d 948.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1956. The petition for a writ of certiorari was filed on June 18, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

During the years 1943 through 1949 the taxpayer voluntarily made entries in his ledger which purported to create an indebtedness to each of his three daughters in the amount of $3,000 each year. In

1950 he transferred to his daughters, in substantially equal portions, shares of stocks having an aggregate value of $56,000, supposedly in discharge of the "debts" shown on the ledger.

The question is whether both courts below were correct in holding tnat the taxpayer's book entries did not represent an enforceable indebtedness, so that the transfer of the stock in 1950 was made without any consideration in money or money's worth and was taxable as a gift under Sections 1000–1002 of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the Internal Rvenue Code of 1939, Sections 1000 (a), 1002, 1003 (a) and (b), 1004 (a) (1), 1005, 1006 (a) and (b), 1018, and 3612 (d) (1), and Treasury Regulations 108, Section 86.2 (a) (5), are set forth in the Appendix, *infra*, pp. 7–10.

STATEMENT

The taxpayer made voluntary entries in his permanent and daily ledger account for the years 1943 through 1949 purporting to show a "debt" of $3,000 each year to each of his three daughters. There was no transfer of any stock, money, property or property rights to the daughters during these years. (Pet. 15.) In 1950 the taxpayer, supposedly in discharge of these "debts," transferred to the three daughters certain stock which had a value of $56,000. (R. 22a–24a, 36a–39a.) The taxpayer did not relinquish dominion or control over the stock until the year 1950. (Pet. 15.)

At indefinite times before 1950 the taxpayer discussed the gift tax problem informally with a New York bank, an attorney, and three unidentified tax agents. There was no formal or written advice obtained by the taxpayer in any instance. The taxpayer was advised to file a gift tax return in 1952; he failed to do so, and the assessment of the tax for the transfer of stock in 1950 was made in 1953, together with a penalty for failure to file a gift tax return. (Pet. 15.)

The District Court held that the entries in the ledger sheets did not constitute valid and effective gifts during the years 1943 through 1949 because of failure of proper delivery, that the gift tax was properly assessed and imposed for the transfer of stock in 1950, and that there was no adequate showing of reasonable cause for failure to file the gift tax return for 1950. (Pet. 15.) The Court of Appeals affirmed in a *per curiam* opinion. (Pet. 2.)

ARGUMENT

1. The decision of the court below, affirming the decision of the District Court, is clearly correct. The taxpayer in 1950 transferred stocks with an aggregate value of $56,000 to his three daughters. Unless the daughters furnished consideration in money or money's worth for those transfers, within the meaning of Section 1002 of the Internal Revenue Code of 1939 (Appendix, *infra,* p. 7), the transfers were gifts within the meaning of Section 1000 (a) (Appendix, *infra,* p. 7). The taxpayer failed to file a gift tax return for 1950 (Pet. 15), apparently because he considered that the transfers in 1950 were made

to satisfy his indebtedness to his three daughters, as shown by the bookkeeping entries in his ledger (Pet. 7; R. 21a–22a, 44a). In this manner, instead of the exclusion of $3,000 permitted for the total amount of gifts to one person during one year under Section 1003 (b) (3) of the 1939 Code (Appendix, *infra*, p. 8), the taxpayer assumed an exclusion of at least $21,000 for each daughter for the year 1950 ($3,000 a year for seven years), and so eliminated any gift subject to the gift tax.

But the taxpayer's argument that the yearly credits of $3,000 to each of his three daughters during the years 1942 through 1949 were gifts which created valid debts (Pet. 7, 8) has no merit, as the courts below held (Pet. 15, 2). Even if the taxpayer had attempted to create a debt by delivering his promissory note, it would not have represented a valid, present gift of an enforceable promise. As the New York Court of Appeals, speaking through Judge Cardozo, said in *Dougherty* v. *Salt*, 227 N. Y. 200, 202, such a note is a "voluntary and unenforcible promise of an *executory gift* * * *." (Emphasis added.)*

The present case, where the taxpayer attempted to create a debt by his own book entries, and where nothing was delivered (see *Richardson* v. *Commissioner*, 126 F. 2d 562, and *Speaker* v. *Keating*, 122 F. 2d 706, both decided by the court below), is an *a fortiori* situation compelling the conclusion that

* See also *French* v. *Commissioner*, 138 F. 2d 254, 258 (C. A. 8th); G. C. M. 16460, XV–1 Cum. Bull. 369 (1936); *Brown on Personal Property* (2d ed.), Section 59, p. 188, and cases cited in fn 26.

the daughters had been given nothing before 1950 and had no enforceable rights against the taxpayer. It is equally clear that since the daughters gave no consideration for the bookkeeping entries of $3,000 for each of seven years, there was no valid account stated. See II *Restatement of the Law of Contracts,* Section 422, Comment f; *French* v. *Commissioner,* 138 F. 2d 254, 258 (C. A. 8th); *Johnson* v. *Commissioner,* 86 F. 2d 710, 713 (C. A. 2d).

In short, there was no consideration for the taxpayer's transfer of the stock in 1950 and it was properly held to be taxable as a gift.

2. There is no conflict of decisions. Although the taxpayer alleges (Pet. 8) that the decision of the court below is contrary to that of the New York Court of Appeals in *Corr* v. *Hoffman,* 256 N. Y. 254, the latter case is substantially different. In that case one partner instituted proceedings against his co-partner, alleging misappropriation of partnership funds through fraudulent records and entries in the firm books. The defendant had furnished the plaintiff with annual statements of account of partnership profits, and the evidence showed that the plaintiff accepted the accounts submitted by the defendant over a period of years. While the referee found that some of the book entries were false and misleading, he exonerated the defendant from charges of fraud and misappropriation of partnership funds; he decided that the entries were made in good faith, for legitimate purposes, and caused no injury to the plaintiff. The Appellate Division upheld the referee in substance, and the Court of Appeals affirmed the

decision of the referee. While the account stated in that case was a valid contract, as the court decided, there was no account stated in this case because of the absence of consideration. See p. 5, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

(26 U. S. C. 1952 ed., Sec. 1002.)

SEC. 1003. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 1004.

(b) [As amended by Sec. 454, Revenue Act of 1942, c. 619, 56 Stat. 798] *Exclusions from gifts.*

* * * * *

(2) *Gifts after 1938 and prior to 1943.*—In the case of gifts (other than gifts in trust or of future interests in property) made to any person by the donor during the calendar year 1939 and subsequent calendar years prior to

1943, the first $4,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

(3) *Gifts after 1942.*—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1943 and subsequent calendar years, the first $3,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

(26 U. S. C. 1952 ed., Sec. 1003.)

SEC. 1004 [As amended by Sec. 455, Revenue Act of 1942, *supra*]. DEDUCTIONS.

In computing net gifts for the calendar year 1942 and preceding calendar years, there shall be allowed (except as otherwise provided in paragraph (1) of subsection (a)) such deductions as are provided for under the gift tax laws applicable to the years in which the gifts were made.

In computing net gifts forthe calendar year 1943 and subsequent calendar years, there shall be allowed as deductions:

(a) *Residents* .—In the case of a citizen or resident—

(1) *Specific exemption.*—An exemption of $30,000, less the aggregate of the amounts claimed and allowed as specific exemption in the computation of gift taxes for the calendar year 1932 and all calendar years intervening between that calendar year and the calendar year for which the tax is being computed under the laws applicable to such years. This exemption shall be applied in all computations in respect of the calendar year 1942 and previous calendar years for the purpose of computing the tax for the calendar year 1943 or any calendar year thereafter.

* * * * *

(26 U. S. C. 1952 ed., Sec. 1004.)

(26 U. S. C. 1952, ed., Sec. 1006.)

SEC. 1005. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

(26 U. S. C. 1952, ed., Sec. 1005.)

SEC. 1006. RETURNS.

(a) *Requirement.*—Any individual who within the calendar year 1940 or any calendar year thereafter makes any transfers by gift (except those which under section 1003 are not to be included in the total amount of gifts for such year) shall make a return under oath in duplicate. The return shall set forth (1) each gift made during the calendar year which under section 1003 is to be included in computing net gifts; (2) the deductions claimed and allowable under section 1004; (3) the net gifts for each of the precedig calendar years; and (4) such further information as may be required by regulations made pursuant to law.

(b) *Time and Place for Filing.*—The return shall be filed on or before the 15th day of March following the close of the calendar year with the collector for the district in which is located the legal residence of the donor, or if he has no legal residence in the United States, then (unless the Commissioner designates another district) with the collector at Baltimore, Maryland.

SEC. 1018. ADDITION TO THE TAX IN CASE OF DELINQUENT RETURN.

For addition to the tax in case of failure to make and file a return required by this chapter within the time prescribed by law or prescribed by the Commissioner in pursuance of the law, see section 3612 (d) (1).

(26 U. S. C. 1952 ed., Sec. 1018.)

SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

* * * * *

(d) *Additions to Tax.*—

(1) *Failure to file return.*—In case of any

failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax: *Provided,* That in the case of a failure to make and file a return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after August 30, 1935, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3612.)

Treasury Regulations 108, Relating to the Gift Tax under the Internal Revenue Code of 1939:

SEC. 86.2 *Transfers Reached.*—(a) *In general.*— * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transfers were not made for an adequate and full consideration in money or money's worth:

* * * * *

(5) If A with his own funds purchases property and has the title thereto conveyed to himself and B as joint owners, with rights of survivorship (other than a joint ownership described in example (4) of this section), but which rights may be defeated by either party severing his interest, there is a gift to B in the amount of one-half the value of such property.

* * * * *

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